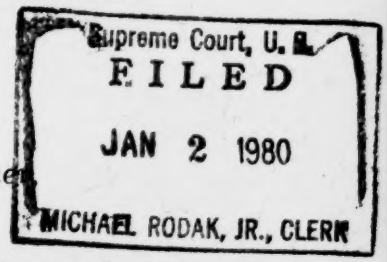
Supreme Court of the United States

October Term, 1979
No. 79-833



ROBERT J. KONDRAT, *Petitioner*

vs.

CITY OF WILLOUGHBY HILLS, *et al.*, *Respondents.*

BRIEF IN OPPOSITION TO CERTIORARI

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OPINION BELOW

The opinion of the Sixth Circuit Court of Appeals is reported at 601 F.2d 589.

JURISDICTIONAL STATEMENT

The judgment which petitioner seeks to have reviewed was filed on June 15, 1979. There were no applications for extensions of time.

This Court could have asserted jurisdiction pursuant to 28 U.S.C., Section 1254(1), by way of certiorari to the Sixth Circuit Court of Appeals.

This Court lacks jurisdiction in this case, however, due to the failure of the petitioner to comply with 28 U.S.C., Section 2101(c).

Section 2101(c) confers jurisdiction on this Court to review a judgment or decree in a civil action by way of certiorari if applied for within 90 days after entry of such judgment or decree.

As noted, the judgment sought to be reviewed was filed by the Sixth Circuit Court of Appeals on June 15, 1979. Petitioner's time to file his petition thus expired on September 13, 1979. The petition was filed[1] on October 17, 1979, 124 days after the entry of judgment, and far outside the time within which this Court could acquire jurisdiction of the case.

Additional comments regarding the lack of jurisdiction will be found in the argument.

QUESTIONS PRESENTED

Presented By Respondents:

1. Does the Supreme Court of the United States have jurisdiction to review, by way of certiorari, an order of a federal Court of Appeals, where the petitioner does not present his petition within the time set by statute?

Presented By Petitioner:

2. Can absolute immunity be granted to officials for actions conducted during the investigative and/or administrative stages?

3. Can absolute immunity be granted to officials such as mayors and Board of Election heads? If so, where does absolute immunity stop?

1. Petitioner filed a document styled as a petition for certiorari with this Court on October 17, 1979. Because the document failed to comply with Rule 39, it was rejected by the Clerk on October 18, 1979.

The petition before this Court was filed by the petitioner on November 30, 1979, but, pursuant to Rule 39(4) the effective date of filing is considered to be October 17, 1979.

4. Is a city or county considered as persons and be subject to liability for actions that infringe upon the constitutional rights of citizens?

5. Is incarceration without plumbing and/or light considered as cruel and unusual punishment?

6. Can justice be expected to prevail when justice itself is a defendant?

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Title 28, United States Code, Section 2101(c) and (d):

> (c) Any other appeal or any writ of certiorari intended to bring any judgment or decree in a civil action, suit or proceeding before the Supreme Court for review shall be taken or applied for within ninety days after the entry of such judgment or decree. A justice of the Supreme Court, for good cause shown, may extend the time for applying for a writ of certiorari for a period not exceeding sixty days.
>
> (d) The time for appeal or application for a writ of certiorari to review the judgment of a State court in a criminal case shall be as prescribed by rules of the Supreme Court.

Rule 22, Rules of the Supreme Court of the United States (in part):

> 1. A petition for writ of certiorari to review the judgment of a state court of last resort in a criminal case shall be deemed in time when it is filed with the clerk within ninety days after the entry of such judgment.

* * * * *

2. A petition for writ of certiorari to review the judgment of a court of appeals in a criminal case shall be deemed in time when it is filed with the clerk within thirty days after the entry of such judgment.

* * * * *

3. A petition for writ of certiorari in all other cases shall be deemed in time when it is filed with the clerk within the time prescribed by law.

STATEMENT OF THE CASE

Petitioner, a resident of Willoughby Hills, Ohio, participated in a petition drive, the object of which was to recall certain elected city officials. The Clerk of the City Council found the petitions defective under state law. The organizers then sought a writ of mandamus from the Ohio Supreme Court ordering the Clerk to place the recall on the November, 1976 ballot, but that Court, in *State, ex rel. Macko v. Monzula,* 48 Ohio St. 2d 35 (1976), agreed that the petitions were defective and denied relief.

Subsequently, petitioner was indicted in state court on several counts of perjury for allegedly making false statements under oath concerning the procedures he followed in gathering signatures for the petition drive. After his arrest, petitioner was promptly arraigned, but he refused at that time to sign a personal recognizance bond or otherwise to take the steps necessary to secure his release. As a consequence, plaintiff was held in the county jail for six days; he then signed the personal bond and was released. Petitioner was acquitted of the criminal charges at the close of the State's case.

Petitioner then brought this action in the U.S. District Court for the Northern District of Ohio, which had jurisdiction pursuant to 28 U.S.C., Sections 1331 and 1343.

Petitioner's complaint alleges that various actions by the defendants violated plaintiff's rights under the civil rights laws and the First, Fifth, Sixth, Eighth and Fourteenth Amendments. More specifically, the complaint asserts that the defendants unlawfully interfered with the petition drive, denied petitioner due process of law at his arraignment, and subjected him to cruel and unusual punishment during his six-day incarceration. Named as defendants are the City of Willoughby Hills, Lake County, Judge John M. Parks, Prosecutor John E. Shoop, Lake County Board of Elections Chairman E. W. Mastrangelo, and Lake County Sheriff Edwin Cunningham.

The trial court sustained a motion by all defendants to dismiss the complaint pursuant to Civ. R. 12(b)(6), in that petitioner had failed to state a claim upon which relief could be granted.

The Court of Appeals affirmed the dismissal, holding that even when construed in the light most favorable to plaintiff, the complaint failed to state *any* claim upon which relief could be granted.

In reaching the result, the Court of Appeals considered petitioner's allegations against the city and county in light of this Court's holding in *Monell v. New York Board of Social Services,* 436 U.S. 658 (1978), which had been decided after the District Court's action. Even in light of *Monell,* the Court of Appeals found, the complaint failed to state a claim upon which relief could be granted against either governmental entity.

The Court of Appeals opinion also noted, *inter alia,* that petitioner was unable to supplement his complaint

with any cognizable allegation when given the opportunity at oral argument, despite "searching inquiry" from the bench.

The judgment of the Court of Appeals was entered on June 15, 1979. On October 17, 1979, 124 days later, petitioner filed his petition for certiorari with this Court.

ARGUMENT

I. THE SUPREME COURT OF THE UNITED STATES LACKS JURISDICTION TO REVIEW, BY WAY OF CERTIORARI, AN ORDER OF A FEDERAL COURT OF APPEALS IN A CIVIL CASE WHERE THE PETITIONER DOES NOT PRESENT HIS PETITION WITHIN THE TIME SET BY STATUTE.[2]

Title 28, U.S.C., Section 2101, establishes time limitations for litigants who wish to assert the appellate jurisdiction of this court by way of appeal or certiorari, defining specifically the limits for civil litigants[3] but leaving to the discretion of this court the setting of specific limits for criminal case litigants.[4]

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2. All respondents join in presentation of this argument.

3. 28 U.S.C., Section 2101(c):

Any other appeal or any writ of certiorari intended to bring any judgment or decree in a civil action, suit or proceeding before the Supreme Court for review shall be taken or applied for within ninety days after the entry of such judgment or decree. A justice of the Supreme Court, for good cause shown, may extend the time for applying for a writ of certiorari for a period not exceeding sixty days.

4. 28 U.S.C., Section 2101(d):

The time for appeal or application for a writ of certiorari to review the judgment of a State court in a criminal case shall be as prescribed by rules of the Supreme Court.

Rule 22(1) and (2) of the Rules of this Court implement the statutory grant of discretionary power regarding *criminal* cases. As regards *non-criminal* cases, Rule 22(3) is explicit:

> A petition for a writ of certiorari in all other cases shall be deemed in time when it is filed with the clerk within the time prescribed by law.

Recent decisions of this Court have held that, as regards Rule 22 (2), a failure of a criminal case litigant to file a petition within the time stated therein does not deprive this Court of jurisdiction, but that it may, in the exercise of its statutorily granted discretion, waive the Rule and grant certiorari "when the ends of justice so require".[5] This holding is wholly consistent with the principle that "it is always within the discretion of a court or an administrative agency to relax or modify its procedural rules adopted for the orderly transaction of business before it when in a given case the ends of justice require it".[6]

But although Congress has delegated to this Court the discretion to establish, and hence waive, such time limitations in criminal cases, Congress reserved unto itself the setting of time limits for petitioning for certiorari in civil cases, and has set those limits, at 28 U.S.C., Section 2101(c).[7]

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5. *Schacht v. United States*, 398 U.S. 58 at 64 (1970); *Taglianetti v. United States*, 394 U.S. 316, n.1 (1969); *Heflin v. United States*, 358 U.S. 415, n.7 at 418 (1959).

6. *American Farm Lines v. Black Ball*, 397 U.S. 532 at 539 (1970).

7. See note 3, *supra*. Both 28 U.S.C., Section 2101(a) and (b), dealing with direct appeals from the district courts, establish specific time limitations and, although not involved herein, would be governed by the same jurisdictional principles which govern petitions or appeals filed under Section 2101(c).

This Court thus has not been delegated discretion to establish and waive rules regarding the time to petition for certiorari in civil cases which fall within the purview of Section 2101(c), and may not waive the limitation herein.[8]

Such a conclusion is compelled by the prior decisions of this Court, which have held that *statutory* time limits for petitioning for certiorari are jurisdictional in nature, and absent compliance by the petitioner, this Court has no jurisdiction to hear the case.[9] In *Federal Trade Commission v. Minneapolis-Honeywell Co.*, 344 U.S. 206 (1952) it was held, at 213:

> ". . . we do mean to encourage applicants to this Court to take heed of another principle—the principle that litigation must at some definite point be brought to an end. It is principle reflected in the statutes which limit our appellate jurisdiction to those cases where review is sought within a prescribed period." (footnote omitted)

Therefore, this Court is compelled to deny the petition for certiorari herein for a failure to comply with 28 U.S.C., Section 2101(c),[10] a failure which denies to this Court jurisdiction to hear the case.

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8. See *Schacht v. United States*, 398 U.S. 58 at 68 (Harlan, J., concurring) (1970).

9. *Matton Steamboat Co. v. Murphy*, 319 U.S. 412 (1943); *Department of Banking v. Pick*, 317 U.S. 264 at 268 (1942); *Citizens Bank v. Opperman*, 249 U.S. 448 (1919).

10. A failure to comply with 28 U.S.C., Section 2101(c) has barred many a petitioner from this Court, although the denials of certiorari do not note whether the denial is discretionary or jurisdictional. See, e.g., *Donn v. Chatfield*, 434 U.S. 875 (1977); *Fogg v. Welcome*, 432 U.S. 911 (1977); *Bureau of Revenue v. Fox*, 424 U.S. 933 (1976); *Hourihan v. Dakin*, 416 U.S. 951 (1974); *Foster v. Montanye*, 415 U.S. 1000 (1974); *Pruett v. First National Bank of Nevada*, 415 U.S. 995 (1974); *Hayden Stone, Inc. v. Piantes*, 415 U.S. 995 (1974); *Hart v. Coiner*, 415 U.S. 938 (1974).

II. NEITHER SPECIAL NOR IMPORTANT REASONS EXIST TO WARRANT A DISCRETIONARY GRANT OF CERTIORARI IN THIS CASE.

The Sixth Circuit Court of Appeals did not, *sub judice*, render a decision in conflict with another court of appeals on the same matter, did not decide a question of federal law not heretofore settled by this Court, has not decided a federal question in a manner conflicting with the applicable decisions of this Court; nor did it depart from accepted and usual judicial proceedings so as to call for an exercise of this Court's power of supervision. In short, there is neither special nor important reasons for which a discretionary grant of certiorari is warranted.

A. The Court of Appeals Correctly Applied Existing Law in Affirming Dismissal of the Complaint Against Respondents Lake County, Judge John M. Parks, Prosecutor John E. Shoop, and Board of Elections Chairman E. W. Mastrangelo.[11]

Any fair or even broad reading of petitioner's complaint shows that even though Lake County is alleged to have violated petitioner's rights, the acts complained of are solely those of individuals.

At no place in the complaint is there any allegation or hint of allegation whatever that the acts complained of are the result of official county policy, legislation, or custom.

For this reason alone, the complaint fails to state a claim upon which relief could be granted. In *Monell v. New York Board of Social Services*, 56 L. Ed. 2d 611 (1978), this Court held, at 635:

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11. Respondents Lake County, Judge John M. Parks, Prosecutor John E. Shoop, and Board of Elections Chairman E. W. Mastrangelo join in presentation of this argument.

> Local governing bodies, therefore, can be sued directly under Section 1983 . . . where, as here, the action that is alleged to be unconstitutional implements or executes a policy statement, ordinance, regulation, or decision officially adopted or promulgated by that body's officers. Moreover, . . . local governments, . . . may be sued for constitutional deprivations visited pursuant to governmental "custom" . . . .

This Court concluded, at 636:

> On the other hand, the language of Section 1983, read against the background of the same legislative history, compels the conclusion that Congress did not intend municipalities to be held liable unless action pursuant to official municipal policy of some nature caused a constitutional tort.

Absent such an allegation—that some official policy caused a deprivation of a right guaranteed by the constitution, petitioner's complaint failed to state a claim upon which relief could be granted against Lake County, and, it was properly dismissed.

The Court of Appeals also committed no error in affirming dismissal of the complaint as to the named county officials.

Judge John M. Parks, who was alleged to have denied petitioner his rights by refusing to explain the indictment to petitioner at arraignment, is wholly immune from suit for actions performed in his official capacity. *Pierson v. Ray*, 386 U.S. 547 (1967).

Prosecutor John E. Shoop, alleged to have denied petitioner his rights by collaborating with others to suppress petitioner's recall efforts in 1976, did not take office until January 2, 1977, and thereafter engaged only in supervision

of the then-pending criminal action against petitioner. Reading the complaint as indulgently as possible, it appears petitioner alleges, at most, that Prosecutor Shoop should be liable for actions taken in the prosecution of a criminal case. This Court has affirmatively stated that he may not; that prosecutors are immune from liability for actions taken in performance of official litigation duties. *Imbler v. Patchman*, 424 U.S. 409 (1976).

The Court of Appeals thus did not err in dismissing the complaint against Prosecutor Shoop.

Absolute immunity cannot be claimed for Board of Elections Chairman E. W. Mastrangelo. But, as an administrative officer, Mastrangelo does have a qualified immunity from suit provided he (1) acts in good faith, (2) within the bounds of his authority, and (3) in a manner which does not violate the clearly established constitutional rights of persons with which he deals. *Procunier v. Navarette*, 434 U.S. 555 (1978); *O'Connor v. Donaldson*, 423 U.S. 363 (1975); *Scheuer v. Rhodes*, 416 U.S. 232 (1974).

Plaintiff's complaint is only that defendant Mastrangelo's staff refused to provide him copies of rules regarding the validation of signatures on petitions. Even if such an act could somehow violate some colorably constitutional right, such a right has not been clearly established. Further, no allegation is made that Mastrangelo acted outside his authority or that his actions were in bad faith. Thus, neither the District Court nor the Court of Appeals erred in dismissing, and affirming dismissal, of the complaint against Board of Elections Chairman E. W. Mastrangelo.

It appearing that no error occurred *sub judice* regarding the dismissal of the complaint against Lake County or its officers, the petition for certiorari should be denied.

B. The Court of Appeals Correctly Applied Existing Law in Affirming Dismissal of the Complaint Against the City of Willoughby Hills.[12]

While respondents recognize that the decision of this Court in the case of *Monell v. New York Board of Social Services,* 436 U.S. 658, 56 L. Ed. 2d 611 (1978) was announced subsequent to the dismissal of the Complaint by the District Court, it is clear that the Court of Appeals carefully considered the Complaint and properly affirmed its dismissal.

The Complaint in this matter fails to allege any facts which would tend to establish liability under federal civil rights statutes. This is made apparent by the failure of the Complaint to state facts which would show or tend to show that plaintiff was denied any constitutionally guaranteed right by operation or application of some city ordinance, custom or usage. No such allegation is contained in the Complaint, and, under the rules set forth by this Court in the *Monell* case such an allegation must be made and proven for there to be recovery against a governmental entity.

This Court will also note that the Court of Appeals, on this issue among others, conducted a "searching inquiry from the bench" concerning the allegations of the Complaint. The appellate Court, even after this careful questioning of the petitioner, was unable to conclude that petitioner had stated a claim under the civil rights laws, even reading the Complaint "as indulgently as possible."

It should also be pointed out that petitioner has, since the filing of his Complaint in the District Court in May of 1977, filed no less than five separate actions against defendants herein (respondents) and others in the Court of

12. Respondent City of Willoughby Hills presents this argument.

Common Pleas for Lake County, Ohio. These cases were presented to the Court of Appeals in a Supplemental Appendix (by copies of Complaints, relevant Judgment Entries and other explanatory documents).

These cases in state court, taken individually and collectively, rely on the same operative facts as those pleaded in the complaint in the case at bar and raise or could have raised the same issues presented therein.

Because petitioner has elected to bring the claims presented by the matters described in the Complaint herein to the attention of the state courts, the Court of Appeals correctly left undisturbed the decision of the District Court which leaves petitioner with his state court actions, the determination of which would be *res judicata* to the claims petitioner asserts in this case.

CONCLUSION

Petitioner has failed to properly invoke the jurisdiction of this Court and to present special and important reasons for granting a writ of certiorari.

To properly invoke the jurisdiction of this Court, petitioner must have filed his petition not later than 90 days from the entry of judgment by the Court of Appeals, as required by 28 U.S.C., Section 2101(c). By failing to file the petition until the 124th day, he deprived this Court of the ability to adjudicate his claim and for that reason alone certiorari must be denied.

But it is also manifest that petitioner has, in fact, failed to state *any* claim against the respondents on which the District Court could have granted relief. Both the District Court and Court of Appeals, correctly reading the Complaint as indulgently as possible and providing him extensive opportunities to supplement the allegations,

were unable to find that a legally-cognizable allegation was raised. Such a finding by both lower courts should carry great weight here, *Offut v. United States,* 348 U.S. 11 at 15 (1954), and compel the use of sound discretion to deny certiorari herein.

Respectfully submitted,

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